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IN THE

Supreme Court of the United States

OCTOBER TERM 1954.

NO. 739

BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA,
Petitioner

VS.

HUBERT WESLEY DRIGGERS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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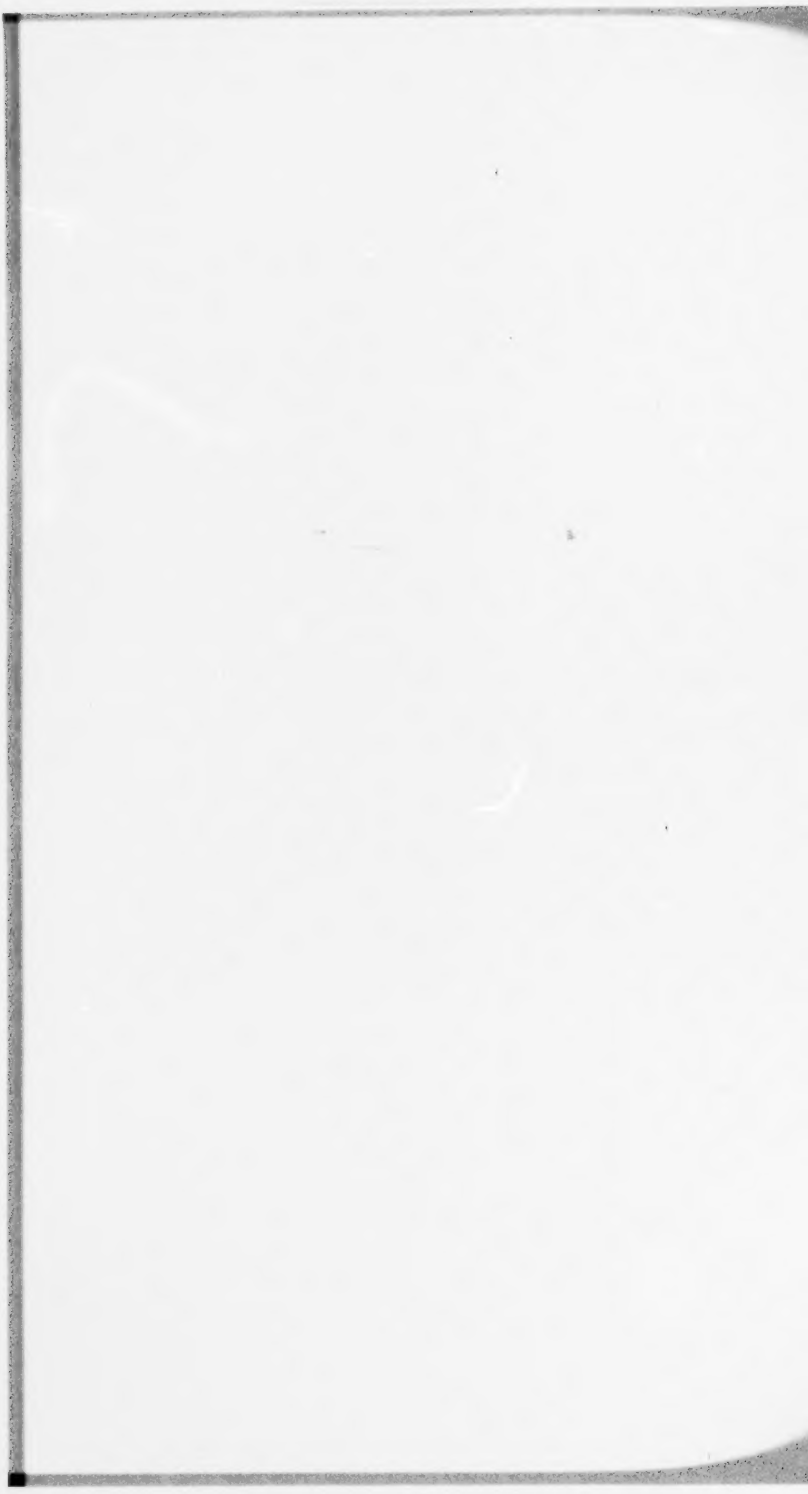

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VS.

HUBERT WESLEY DRIGGERS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Business Men's Assurance Company of America prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause on January 28, 1955.

OPINIONS BELOW

The District Court filed no opinion, but merely entered judgment sustaining the motion for summary judgment (R. 59-60). The opinion of the Court of Appeals has not been reported at the time of this application, but is set forth in Appendix A to this petition, infra p. 15.

A dissenting opinion, also appended to this petition in Appendix A, infra p. 29, was filed by Chief Judge Joseph C. Hutcheson, Jr. Inasmuch as the controlling question presented in this application is that the judgment of the Court of Appeals for the Fifth Circuit in a prior suit between these same parties is res judicata of the present suit, the opinion in *Driggers vs. Business Men's Assurance Company of America*, 199 Fed. (2) 911, is also set forth in Appendix A to this petition, infra p. 32.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 28, 1955, infra p. 15. A petition for rehearing filed February 14, 1955 (R. second case pp. 54-94) was denied February 24, 1955, Appendix A, infra p. 38. The jurisdiction of this Court is invoked under 28 U. S. C. A., Sec. 1254 (1), and 28 U. S. C. A., Sec. 1652 in that:

(a) The majority of the Court of Appeals has rendered a decision on the question of res judicata in a suit based upon a Texas contract which is in conflict with the laws of Texas, and the decisions of the Texas Courts as exemplified by such cases as *Stephenson, et al vs. Miller Link Lumber Company*, 277 S.W. 1039 and *Mayfield Co. v. Rushing*, 127 S.W. (2) 185, and

(b) The majority of the Court of Appeals in its holding on the question of res judicata in the instant case has

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so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

QUESTIONS PRESENTED

1. Where the record plainly shows that respondent has brought identically the same cause of action, based on the same policy of insurance, setting up the same alleged accidental injury which was claimed to have resulted in immediate total disability, claiming the same alleged acts as an anticipatory breach, and again claiming damages in a lump sum by reason of said alleged breach, should not the judgment of the Trial Court and the Court of Appeals in the prior suit be held to be res judicata in the present suit?

2. Where the record on appeal in the first case shows, without dispute, that questions were put in issue in that case which applied with equal force to the insurance contract in question in its entirety, and furnished complete defenses to any suit on the contract, should it not have been held that the judgment in the first case was res judicata, and had put an end to the litigation?

3. Is not the holding of the majority of the Court of Appeals for the Fifth Circuit in the instant case contrary to, and in violation of 28 U. S. C. A. 1652, which makes the laws of Texas, and the decisions of the appellate courts of Texas, controlling in a civil action arising in Texas involving a Texas contract?

STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix B, infra p. 39.

STATEMENT

Respondent's petition, filed February 12, 1954, in the instant case shows that the suit was based on Policy LC 420556, issued by petitioner on January 11, 1948; that he claimed to have sustained an accidental injury on March 7, 1948 which had resulted in total and continuous disability from that date; that petitioner, by returning a premium sent in on or about July 8, 1949 and refusing to renew his policy, had committed an anticipatory breach of its contract, and sought to recover damages in the sum of $78,290.40 (R. second case pp. 1-5)

Respondent's petition filed in the first case, on April 4, 1950, copy of which petition was attached to petitioner's motion for summary judgment as an exhibit (R. second case pp. 29-33) shows that the suit was based on Policy LC 420556, issued by petitioner on January 11, 1948; that he claimed to have sustained an accidental injury on March 7, 1948 which resulted in total and continuous disability from that date; that petitioner, by returning a premium sent in on or about July 8, 1949 and refusing to renew his policy, had committed an anticipatory breach of its policy; and sought to recover damages in the lump sum of $50,400.00, with an additional 12% penalty of

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$6,000.00, and an attorneys' fee of $15,000.00 (R. first suit pp. 1-5).

Petitioner filed its motion for summary judgment in the instant case, (R. second case pp. 24-29) to which were attached as exhibits, and made a part thereof, respondent's petition in the first case (R. second suit pp. 29-33); petitioner's answer to that petition (R. second case pp. 34-48); copy of the Trial Court's judgment in the first case (R. second case pp. 48-51); and the opinion of the United States Court of Appeals for the Fifth Circuit in the first case (R. second case pp. 52-56).

Nowhere in respondent's Reply to Motion for Summary Judgment (R. second case pp. 57-58) does he contend for the recovery of benefits which may have accrued since the date of the judgment in the first case. Nor does he make any such contention in his Specification of Errors nor in his brief filed in the instant case.

Policy LC 420556, which forms the basis for both suits, only provides benefits for loss of time due to bodily injuries which such injuries *totally and continuously disable* insured from the date of accident (R. first case p. 60). Said policy further required notice of injury within 20 days from date of accident (R. first case p. 87) and proofs of loss within 91 days from accrual (R. first case pp. 88-89).

Petitioner filed its answer in the first case in which it clearly raised the issue that it did not owe respondent

any further benefits for the alleged occurrence of March 7, 1948 (R. first case p. 6); affirmatively pleaded that respondent sent the proofs for sickness benefits from March 7, 1948 to March 24, 1948, describing his condition as Sciatic Rheumatism, and was paid $93.33 in full settlement of that claim, (R. first case p. 15); it further affirmatively pleaded that respondent sent in a second set of proofs of claim asserting benefits from May 28, 1948 to June 14, 1948, describing his condition as Sciatic Neuritis originating from the incident of March 7, 1948, and *affirmatively showing that he had resumed his duties on November 15, 1948* for which he was paid the sum of $600.00 in full settlement (R. first case pp. 16-17). Petitioner further raised the defenses (1) that respondent's disabilities, if any, were neither total, permanent, nor continuous from March 7, 1948; (2) that respondent having elected to collect sickness benefits on two occasions for the incident of March 7, 1948 was estopped to now attempt to collect accident benefits for the same occurrence; and (3) that respondent has executed full and complete releases for the incident of March 7, 1948 (R. first case pp. 17-18).

Respondent admitted, while on the stand in the first case, that he submitted proofs of claim in May, 1948, and the claim itself was offered in evidence, *showing he resumed part time duties March 24, 1948*, and was paid $93.33 in full settlement of his claim. (R. first case pp. 106-116). He further admitted he put in a second claim

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for the March 7, 1948 incident in January,, 1949, claiming benefits from May 28, 1948 to June 114, 1948, *and showing he had resumed his duties Novemlber 15, 1948*, for which he was paid the sum of $600.00 ((R. first case pp. 117-128). He further admited he madle no further claims, and had no further communicatioms until suit was filed. (R. first case pp. 130-133)

Petitioner clearly raised all of the foregoiing issues in its motion for judgment non obstante veredicto (R. first case pp. 178-186) which motion was sustaineed and judgment was entered for petitioner (R. first case pp. 188-191). This judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit, *Driggers vs. Business Men's Assurance Company of America*, 199 Fed. (2) 911, as set forth in Appendix A, infra, p. 32.

When the instant suit was filed petitioner presented motion for summary judgment, (R. second case pp. 24-52) which was granted and judgment for petitioner entered (R. second case pp. 59-60).

In a divided opinion the Court of Appeals for the Fifth Circuit has reversed the cause, and remanded it for a new trial, Appendix A, infra, pp. 15-29.

The basis of federal jurisdiction in both the first and second cases was diversity of citizenship, respondent being a resident and citizen of Texas and petitioner being a resident and citizen of Missouri.

REASONS FOR GRANTING THE WRIT

The policy of insurance which forms the basis of this controversy was a Texas contract, and, under authority of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64; 82 L. Ed. 1188, as well as 28 U. S. C. A. sec. 1652, the law of Texas is the controlling rule of decision as to both the substantive and procedural rights of the parties.

Petitioner respectfully asserts that the decision of the majority of the Court of Appeals for the Fifth Circuit in the instant case is in direct conflict with prior decisions of the appellate courts of Texas on the question of res judicata as applied to the facts of this case, and has so far departed from the usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

It is the settled law of Texas that any right, fact, or matter in issue and directly adjudicated upon, or necessarily involved in the determination of an action before a court of competent jurisdiction in which a final judgment is entered is conclusively settled by that judgment as between the same parties, and cannot again be litigated, whether the claim, demand, purpose, or subject matter of the two suits is the same or not. See *Stephenson v. Millier-Link Lumber Co.*, 277 S.W. 1039; *Richardson v. Trout* (writ ref.) 135 S.W. 677; *Carter v. Bacle*, 94 S.W. (2) 817; *Griffin v. McFarlane*, 96 S.W. (2) 1000; and *Ray v. Chisum*, 260 S.W. (2) 118.

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It is further the settled law of Texas that a final judgment determines all of the issues raised by the pleadings unless the court excludes some of the issues from the effect of the adjudication, regardless of whether, or not, such issues are referred to in the judgment itself. See *Hermann v. Allen*, 103 Tex. 382, 128 S.W. 115; *Shell Petroleum Corporation, et al vs. Railroad Commission of Texas, et al*, 86 S.W. (2) 57; *Waggoner v. Knight*, (Com. App.) 231 S.W. 357.

It is further the settled law of Texas that if in a former suit an issue which goes to the foundation and existence of a cause of action has been litigated, such issue cannot be again litigated in a later suit, regardless of the form it takes. See *Mayfield Co. v. Rushing*, 133 Tex. 120, 127 S.W. (2) 185.

Petitioner is in complete accord with the views expressed by Chief Judge Joseph C. Hutcheson, in his dissenting opinion, that an examination of respondent's petitions in the two cases, clearly demonstrates that the second suit was solely an action for an alleged anticipatory breach of the policy in question, based upon the same alleged accident of March 7, 1948, and the same alleged acts constituting an anticipatory breach, and seeking recovery of his damages in a lump sum. That such was respondent's own view of the case is demonstrated by the fact that, neither in his reply to the motion for summary judgment, nor in his specification of error, nor in his brief filed in the

Court of Appeals for the Fifth Circuit, does he contend that he was asserting a new cause of action based upon the monthly benefits which had accrued since the date of the final judgment in the first case. The causes of action being identical the majority of the Court of Appeals for the Fifth Circuit were clearly in error in reversing said cause, and this petition should be granted to correct such error.

While it is true, as announced in *Universal Life and Accident Ins. Co. v. Shaw*, 163 S.W. (2) 736, that normally each installment of benefits due under a policy of health and accident insurance constitutes a separate cause of action, in the instant case petitioner has been expressly exonerated of being guilty of an anticipatory breach of its contract. Hence, as to any benefits due after the date of the first judgment, as well as to any benefits due up to the date of the first judgment, it was necessary for respondent to plead, and prove, full compliance with the terms and conditions of the policy. Petitioner insists that issues were presented, and necessarily decided, by the Court's judgment in the first case which applied with equal force to the contract in its entirety, and hence that judgment was, and is, res judicata of the entire controversy.

As pointed out in the foregoing "Statement", the policy in question only provided benefits due to bodily injuries accidentally received where respondent was able to plead,

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and prove, that he had been *totally and continuously* disabled from the date of the accident until the date of trial, and made no provision for the payment of benefits for *recurring total disability* due to the same accident. That a failure to discharge this burden is fatal to any recovery is established as the law in Texas by such cases as *Continental Casualty Co. v. Wade*, 101 Tex. 102, 105 S.W. 35; *Hefner v. Fidelity and Casualty Co.*, 160 S.W. 330, aff. 222 S.W. 966; *Herold v. Aetna Life Ins. Co.*, 77 S.W. (2) 1060.

It was further necessary for respondent to plead, and prove, that he had notified petitioner of the alleged accident of March 7, 1948 within twenty days from the date of the accident, and to furnish proofs of loss within ninety one days from the date the particular benefits were due. That compliance with such policy provisions is a necessary condition precedent, and failure to comply therewith is fatal to a recovery is established as the law of Texas by such cases as *McClain v. National Life & Acc. Ins. Co.* (writ ref.) 96 S.W. (2) 836; *Federal Surety Co. v. Smith*, (Com. App.) 41 S.W. (2) 210; *Federal Union Ins. Co. v. Hardin*, 115 S.W. (2) 1144; *Southern States Life Ins. Co. v. Wilshire*, 203 S.W. (2) 588; *West American Ins. Co. v. First State Bank*, 213 S.W. (2) 298; and *McKay v. American Central Ins. Co.*, 245 S.W. (2) 529.

As has been further pointed out in the foregoing "Statement", in the first case petitioner clearly raised, *as com-*

plete defenses to any further liability under the policy in question, the following questions which applied with equal force to the contract in question in its entirety, namely:

(1) That respondent has never notified it that he claimed to have been totally and continuously disabled on March 7, 1948, and had never furnished proofs of loss as to any such claim.

(2) On the contrary, it was pleaded, and proved, that repondent submitted proofs of loss as to the incident of March 7, 1948, describing his condition as "Sciatic Rheumatism," merely claiming disability benefits from March 7, 1948 to March 24, 1948, for which he accepted the sum of $93.33 in full settlement.

(3) Again it was pleaded, and proved, in the first case, that respondent submitted a second claim on January 12, 1949 describing his condition as "Sciatic Neuritis", merely claiming benefits from May 28, 1948 to June 14, 1948, and affirmatively showing that he had resumed his duties on November 15, 1948, for which second claim he was paid the sum of $600.00, which he accepted in full settlement.

That petitioner had a right to rely upon such proofs of loss, and consider it had fully discharged its liability to respondent for the incident of March 7, 1948, is established as the law of Texas by *Bank Savings Life Ins. Co. v. Milan*, (writ ref.) 70 S.W. (2) 294.

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(4) Petitioner further pleaded, and proved, the settlements it had made with respondent, and the vouchers, marked in full settlement for $93.33 and $600.00, as defenses to any further cause of action by respondent for the alleged accident of March 7, 1948.

That such settlements did constitute complete defenses as to any further claims for the incident of March 7, 1948 is established as the law of Texas by such cases as *Texas and Pacific Ry Co. v. Poe* (Sup. Ct.) 115 S.W. (2) 591; *Panhandle & Santa Fe Ry. Co. v. O'Neal,* (writ ref.) 119 S.W. (2) 1077; *Socony-Vacuum Oil Co. v. West,* (writ dis.) 137 S.W. (2) 108; and *Texas Employers Ins. Assn. v. Bottoms,* 200 S.W. (2) 418.

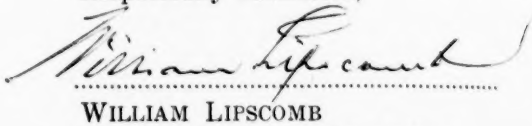
It clearly appears that all of the foregoing questions, which applied with equal force to the contract in its entirety, were put in issue in the first case, both by the pleadings and the undisputed evidence, were urged in support of the motion for judgment non obstante veredicto, and, under the settled law of Texas, were included in the final judgment in the first case, and that judgment should be held to be res judicata of respondent's right to maintain the present cause of action.

It is earnestly urged that if the judgment of the majority of the Court of Appeals for the Fifth Circuit in the instant case is permitted to stand, it will do violence to the settled law of Texas in such cases.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

The Opinions, Judgment and Order of the Court of Appeals for the Fifth Circuit

1. The Opinions:

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 15160

HUBERT WESLEY DRIGGERS, *Appellant*,

VERSUS

BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA, *Appellee*

Appeal from the United States District Court for the Western District of Texas.

(January 28, 1955)

Before HUTCHESON, Chief Judge, and RIVES, Circuit Judge, and DAWKINS, District Judge.

RIVES, Circuit Judge: This appeal is from a summary judgment entered in an action described by appellee as simply an attempt to retry a case finally adjudged

against the appellant in *Driggers v. Business Men's Assurance Company of America*, 5th Cir., 199 F. 2d. 911, decided November 22, 1952. The present action was filed on February 12, 1954.

With a few changes in the amounts claimed to be due and owing and for which judgment is demanded, the complaint in the present action is almost verbatim the same as the complaint in the former case. In each complaint the plaintiff sues on the same health and accident policy issued by the defendant on the 11th day of January, 1948. In each complaint the claimed total and continuous disability of loss of time is alleged to have resulted from an accident described in the same manner and alleged to have occurred on or about the 7th day of March, 1948. In each complaint the plaintiff claims to be entitled to the benefits payable under the policy and particularly under the following provision thereof:

> "1. Total Loss of Time - If such injuries totally and continuously disable the insured from the date of accident or at any time within twenty days hereafter, the Company will pay the monthly indemnity herein specified for the period of such disability as long as the insured lives and remains so disabled."

In each complaint the plaintiff alleges that under the terms of the policy there is now due and owing to him a large sum $5,000.00 in the former action, and $14,200.00 in the present action) and that the defendant has refused to pay such amount on demand. In each complaint, also,

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an anticipatory breach of the entire policy is alleged as follows:

> "The Defendant, Business Men's Assurance Company of America, has repudiated their obligations to the plaintiff unquestionably without cause or justification, but returned to the plaintiff a payment tendered to them on July 8, 1949, which payment represented the premium about to become due on Plaintiff's Policy of insurance and that said defendant advised plaintiff that his policy of insurance was canceled; hence plaintiff alleges that because of the breach of the provisions of said policy unconditionally and without cause and justification, that he is entitled to declare the entire amount of benefits payable under the said policy due and payable in a lump sum."

In the former action, the plaintiff computed his life expectancy at the time of receiving the alleged injury as approximately 21 years, and the entire amount which would be payable under the policy as the sum of $50,400.-00. In the present action, the plaintiff computes his life expectancy at the time of receiving the alleged injury as approximately 22.88 years, and the entire amount which would be payable under the policy as the sum of $53,920.-00. In each complaint, the plaintiff alleges that defendant had been notified in writing and that due proof of loss had been made under the terms of the policy.[1] Each com-

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1 Some of the provisions of the policy as to notice of injury and proof of loss are as follows:
"4. Written notice of injury or of sickness on which claim may be based must be given to the Company within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness. In event of accidental death immediate notice thereof must be given to the Company.
* * * * *

plaint seeks to recover the entire amount which would be payable under the policy plus a 12% penalty under the terms of Article 4376 of the Revised Civil Statutes of Texas together with reasonable attorney's fees. The total amount for which judgment was demanded in the former action was $71,400.00, and in the present action it is $78,290.40.

The defendant filed a full and complete answer pleading all of the defenses it had urged to the prior action, and in addition the defense of res judicata and the four year statute of limitations. The defendant also filed a motion for summary judgment on the grounds of res judicata and that the action based on the alleged anticipatory breach of the policy is barred by the four year statute of limitations prescribed by Article 5527 of the Revised Civil Statutes of Texas.

The plaintiff filed the following reply to defendant's motion for summary judgment:

"1.

"Defendant is not entitled to judgment, as a matter of law, on the ground that the previous suit was res judicata. The United States Court of Appeals for the Fifth Circuit held in support of the Trial Court's entry of judgment non obstante veredicto that defendant had never breached the contract between

"7. Affirmative proof of loss must be furnished to the Company at its said office in the case of claim for loss of time from disability within ninety days after the termination of the period for which the Company is liable, and in case of claim for any other loss, within ninety days after the date of such loss."

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plaintiff and defendant. Further, that proof of loss in respect of the claim for total permanent disability was never made. Therefore, plaintiff's cause of action had not matured until due proof of loss had been made and the claim denied, thereby giving rise to plaintiff's suit for breach of contract. Plaintiff alleges that defendant has breached the contract by its refusal to consider plaintiff's claim or to receive his proofs of loss. Hence, plaintiff alleges that since the United States Court of Appeals for the Fifth Circuit and this Honorable Court have both held that plaintiff had no cause of action in the previous suit, that such suit could not be a bar to the bringing of the present action.

"2.

"Defendant is not entitled to summary judgment on the ground that the action is barred by limitation for the reason that if defendant had not repudiated the contract in 1949, then plaintiff had no cause of action until such contract was repudiated. Plaintiff, in his present suit, alleges that further proofs of loss have been submitted to defendant and that defendant has denied the claim in that his cause of action matured within less than four years from the bringing of this action. Defendant states that it did not breach the contract in 1949, and this Court and the Court of Appeals for the Fifth Circuit so held. Plaintiff further asserts that the filing of the previous suit, the trial and subsequent appeal served to toll the limitation period and that for this additional reason defendant's motion should be denied."

After hearing, the district court entered summary judgment for the defendant from which this appeal is prosecuted.

In the former action a full trial resulted in a verdict of the jury on special issues as follows:

"1. We, the jury, find for the plaintiff, Hubert W. Driggers, that he was totally incapacitated either (a) permanently, or (b), if you find that said incapacity was temporary but not permanent, then state the number of months, if any, which you believe the plaintiff to be totally incapacitated, if he is

"Answer: (a) Permanently
(b) .....

"2. We, the jury, find that the defendant, without cause, reason or justification, expressly repudiated its liability to the plaintiff and denied liability for the injuries sustained by plaintiff as of March 7, 1948. Answer 'Yes' or 'No'.

"Answer: Yes.

"3. We, the jury, find from a preponderance of the evidence that a reasonable attorneys fee will be the sum of $10,000.00.

"4. We, the jury, find from a preponderance of the evidence that the present value of the benefits that plaintiff is entitled to receive from the defendant under the terms of said policy is $52,106.67.

"(S) J. A. SLAUGHTER,
Forman"

After the return of that verdict in the former action, the defendant made its motion for judgment non obstante veredicto upon three grounds: (1) that there was no proper pleading nor proof of an anticipatory breach; (2) that the undisputed evidence showed that plaintiff had

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furnished no proofs that he was disabled, except for two periods, for both of which the defendant had made payment in full; (3) that, under the Texas decisions, the $600.00 voucher, dated June 13, 1949, had all the necessary requisites of a release in full for the claim being asserted by plaintiff.

Pursuant to that motion, the district court entered judgment for the defendant notwithstanding the verdict, but without indicating upon which ground or grounds the judgment was so entered.[2] That judgment was affirmed by this Court, the opinion holding that there had been no anticipatory breach of the policy, and that no demand was made nor proof of loss furnished by the plaintiff, and therefore there was no basis for the suit. *Driggers vs. Business Men's Assurance Co. of America* 199 F. 2d 911.

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2 In material part the judgment reads:

"And it further appearing to the Court that on the 25th day of September, A. D. 1951, defendant, Business Men's Assurance Company of America, duly filed in this cause a proper motion for judgment non obstante veredicto on the ground that the evidence raised no issue of fact and that a directed verdict for the defendant would have been proper, and same should have been granted, that reasonable notice of such motion was given as required by law to John J. Watts, attorney for plaintiff, and that on a hearing hereof both parties came by their attorneys, and the Court having heard and considered such motion, the evidence and argument of counsel, and being of the opinion that the evidence raised no issue of fact, that a directed verdict for defendant would have been proper and that such motion should be granted, it is accordingly ordered that said motion be, and it is hereby granted, and that judgment non obstante veredicto be entered for the defendant, Business Men's Assurance Company of America, a corporation.

"It is therefore ordered, adjudged and decreed by the Court that the plaintiff, Hubert Wesley Driggers, take nothing as against the defendant, Business Men's Assurance Company of America, a corporation, but that said defendant go hence without day, and recover its costs in this behalf expended for which execution may issue, to which judgment of the Court the plaintiff then and there in open Court excepted.

"Dated and signed at El Paso, Texas, this the 15th day of November, A. D. 1951."

The claim for anticipatory breach of the entire policy is exactly the same in the present as in the prior action, and clearly that claim is barred with the rule quoted in *United States vs. Munsingwear*, 340 U.S. 36, 38, from *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49, as the classic statement of the rule of res judicata:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

In addition to recovery for the anticipatory breach specifically demanded together with penalties and attorney's fees, the complaint in both actions also prayed "for such other and further relief as plaintiff may show himself justly entitled to receive either at law or in equity." Even in the absence of such a prayer, we would have to take notice of the provision of Rule 54(c) F.R.C.P. that, "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." The first action was instituted April 4, 1950, and even though it did not specifically demand payment

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of the monthly indemnity then accrued, that relief could have been granted under Rule 54(c) if the proof so authorized. According to this Court's opinion, there was no basis for the suit at all because no demand had been made nor proof of loss furnished by the plaintiff. 199 F. 2d. 911, 913.

There are authorities to the effect that a judgment for defendant not on the merits is conclusive only as to what is actually decided. Am. Law Institute Restatement, Judgments, Section 49; cf. *Angel v. Bullington*, 330 U.S. 183, 190. The following rule is stated in 30 A. Jur., Judgments, Sec. 206, p. 943: "where, after the rendition of a judgment, subsequent events occur, creating a new legal situation or altering the legal rights of relations of the litigants, the judgment may thereby be precluded from operating as an estoppel." See also, *State Farms Ins. Co. v. Duel*, 324 U.S. 154, 162; *City of Shreveport v. Shreveport Ry. Co.*, 5th Cir., 38 F. 2d 945; *Blair v. Commissioner*, 300 U. S. 5, 9; *Memphis City Bank v. Tennessee*, 161 U.S. 186; *Auto Acetylene Light Co. v. Prest-O-Lite Co.*, 264 Fed. 810; *Bedford Bowling Green Stone Co. v. Oman*, 134 Fed. 441. It is not necessary, however, for us to decide whether the recovery of the monthly benefit installments which could, on sufficient proof, have been recovered in the first action is precluded by the doctrine of res adjudicata for nearly all of the claims accrued prior to the institution of the first suit, April 4, 1950, are barred by the four year statute of limitations contained in Article 5527 of

the Revised Civil Statutes of Texas, and the recovery of all such claims is precluded for failure to furnish proofs of loss within ninety days after the termination of the periods for which the Company might be liable as required by paragraph 7 of the policy's "Standard Provisions" quoted in footnote 1, supra.

As to monthly benefit installments accruing after the institution of the first action, res judicata clearly furnishes no defense. As said in *Kontovich vs. United States*, 6th Cir., 99 F. 2d 661, 664, 665:

> "If the claim on which he was accorded judgment grew out of an indivisible contract, the whole being due and payable at the time of the commencement of his original action, or if the questions put in issue in that case applied with equal force to the contract in its entirety, though divisible, the litigation is at an end. There can be no splitting up of a cause of action on a single insurance policy. However, if the insurance is payable in periodic installments or subject to some changed condition, it constitutes an entire contract, but the obligation thereunder is severable, and a prior action does not preclude the parties as to subsequent controversies. United States v. Worley, 281 U. S. 339, 344, 50 S. Ct. 291, 293, 74 L. Ed. 887; United States v. Jackson, 10 Cir., 34 F. 2d 241, 73 A. L. R. 316; United States v. Napoleon, 5 Cir., 296 F. 811."

See other cases collected in Key numered digests under Judgments, Section 603.

Clearly under Texas law, the monthly benefit installments which accrued subsequent to the institution of the

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first action constitute separate causes of action. As said by the Texas Supreme Court in *Universal Life and Accident Ins. Co. v. Shaw*, 163 S.W. 2nd 376, 379.

> "The insured was to pay a certain weekly premium, and in case of disability the insurer agreed to pay the insured a certain weekly benefit. We think the object of the policy was to give to the insured a continuing security, and that the contract is divisible. In other words, when the insurer failed to comply with the terms of the contract and pay the amount due there under, each failure gave rise to a separate cause of action, and the insured had a right of action for each weekly benefit, each being distinct from the other; and she could have brought suit on each benefit as it became due. * * * Limitation ran from the time that each weekly benefit was due, and not from the time the insurer undertook to repudiate its contract. * * *
>
> "This suit was based upon a written contract, and Article 5527, prescribing what suits shall be filed within four years, is applicable. The insured in this case could not, when the four years statute of limitation was invoked, recover for any benefits accruing more than four years prior to the time such suit was filed."

Insofar as the present action sets up causes of action different from those in the first action, the rule to be applied is that of estoppel by judgment rather than true res judicata. *Peckham v. Family Loan Co.*, 5th Cir., 196 F. 2d 838, 840, 841. "Where the second cause of action between the parties is upon a different claim the prior

judgment is res judicata not as to issues which might have been tendered but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered,'" *Mercoid Corporation v. Mid-Continent Co.*, 320 U.S. 661, 671, 64 S. Ct. 268, 274, 88 L. Ed. 376; see also *United States v. International Building Co.*, 345 U. S. 502, 504, 505, 53 S. Ct. 807; *Cromwell v. County of Sac.*, 94 U. S. 351, 353, 24 L. Ed. 681; *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214; *Travelers Ins. Co. v. Commissioner of Internal Revenue*, 2d. Cir., 161 F. 2d. 93, 95; A. L. I., Restatement, Judgments, Sec. 68; 30 Am. Jur., Judgments, Secs. 179, 180.

> "If the judgment in the prior case may have been based on any one of several issues involved therein, but is ambiguous and uncertain as to which of the several issues was the one determined in arriving at the decision, the party invoking the application of the doctrine of res judicata is generally required to show upon which issue the judgment was in fact based; and where this is not done, the judgment does not constitute a conclusive adjudication as to any of the issues involved. A fortiori, where the entry of judgment in an action involving several issues of fact recites a finding on one issue that compels a judgment for the defendant, and is silent as to the rest, the latter, in the absence of some further showing, will be held open to inquiry in future litigation between the same parties based on a different cause of action. * * *" 30 Am. Jur. Judgments, Sec. 283, pp. 997, 998.

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The motion for judgment non obstante veredicto in the first action conceded that: "The policy in question was admittedly in full force and effect, and all premiums had been duly paid for a period beyond March 7, 1948." While the jury's verdict was set aside on other grounds, no court has ever disapproved its findings of fact for the plaintiff and that he was totally incapacitated permanently. It may possibly be that the plaintiff can again prove those facts to the reasonable satisfaction of another jury, and that as to some of the monthly periods the plaintiff can prove upon another trial, as he alleges, that due proofs of loss have been made under the terms of the policy. As to monthly benefit installments accruing subsequent to the institution of the first action, the plaintiff should have that opportunity, and he is not precluded from making such proof by the doctrine of res judicata.

The case of *Universal Life and Accident Ins. Co. v. Shaw*, quoted supra, is also authority establishing the insufficiency of the only other ground upon which the motion for summary judgment was based, and holding that benefits accruing within four years prior to February 12, 1954, the date on which the present action was filed, are not barred by the statute of limitations.

While the plaintiff's demand for judgment in his complaint, Rule 8(a) F.R.C.P., is in the sum of $78,290.40, we do not think that the plaintiff is limited to the "whole hog or none", for, as we heretofore noted, his complaint concludes with a prayer "for such other and further relief

as plaintiff may show himself justly entitled to receiver either at law or in equity", and further, under Rule 54(c), F.R.C.P., the final judgment should grant the relief to which plaintiff may prove himself entitled, even if he has not demanded such relief in his pleadings.

The party moving for summary judgment has the burden of establishing that the material fats are not in dispute, and it is not incumbent on the adverse party to show that summary judgment should not be entered, though the rule does provide that he "may serve opposing affidavits". Rule 56, F.R.C.P. Appellant makes a single specification of error, viz: "The Court erred in entering summary judgment against appellant where there existed genuine issues as to the material facts." That specification covers any error committed by the court in entering summary judgment when genuine issues as to material facts remained for decision. We do not intend to claim for the appellant something which he did not claim for himself. Upon oral argument, appellant's counsel urged that he was entitled at least to recover the accrued monthly installments under the policy. Moreover, while this Court will consider only errors of which the appellant complains, it is not restricted to the appellant's process of reasoning, but may reverse a summary judgment erroneously entered, and remand the cause for such further proceedings as may be just under the circumstances. 28 U. S. C. A. 2106.

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The judgment is, therefore, reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

HUTCHESON, Chief Judge: I dissent.

HUTCHESON, Chief Judge, Dissenting:

I find myself in substantial agreement with the views of the majority on the effect of the State Statutes of Limitation and with the general discussion of the principles of res judicata as the majority opinion states them. I find myself in agreement, too, with the view of the majority that, as to actions for monthly benefit installments accruing after the institution of the first action, the judgment in that action furnishes no defense, and if I could agree that the action in this case was an action for such monthly benefits, I could agree with the conclusion of the majority that the judgment in the first action was not res judicata.

With the premise on which the conclusion of the majority rests, I cannot, however, agree. For I think it quite plain that while the complaint does recite that under the terms of the policy there is now due and owing to him the sum of $14,200.00, it does not sue, nor ask judgment, for this sum. On the contrary, this complaint, as the complaint in the former action did, alleges and sues for an anticipatory breach of the policy, and a lump sum

of $53,920.00 due for the whole period of his life, based on his expectancy. Moreover, in opposition to the motion for summary judgment, plaintiff did not urge or claim, he does not in his specifications of error in his brief urge or even claim, what the majority opinion holds, that he was entitled to recover the accrued installments.

The record standing thus, I cannot agree with the view of the majority that this court should or can treat the suit as one for the recovery of accrued installments instead of, as plaintiff has all along in both suits declared it to be, one for the recovery of a lump sum due for the anticipatory breach of the policy.

It is not exactly clear to me from the opinion of the majority what part in the result arrived at is played by the fact that plaintiff got a verdict on special issues for, though the verdict is set out in full and afterward referred to, it is not claimed, as it could not be,[1] that the verdict

1 30 Am. Jur. p. 938, "Judgments", Sec. 196; Smith v. Smith, 51 NW (2) 276, 32 A. L. R. (2), 1135; Smith v. McCool, 16 Wallace at 561, where it is said:

"A verdict without a judgment in a case like this is of no validity, either as an estoppel or as evidence. To give efficacy to a verdict, general or special, it must be followed by a judgment, and when offered to establish any fact, such fact must have constituted, in whole or in part, the foundation of the judgment which was rendered. Greenleaf says: 'It is only where the point in issue has been determined that the judgment is a bar. If the suit has been discontinued, or the plaintiff becomes nonsuit, or for any other reason there has been no judgment of the court upon the matter in issue, the proceedings are not conclusive.' The matter must have become res judicata."

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itself has survived the judgment for any purpose as evidence, or estoppel, or otherwise.

I respectfully DISSENT from the reversal of the judgment.

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 13954

HUBERT WESLEY DRIGGERS, *Appellant*

VERSUS

BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA, *Appellee*

Appeal from the United States District Court for the Western District of Texas

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(November 22, 1952)

Before HUTCHESON, Chief Judge, and BORAH, and RIVES, Circuit Judges.

HUTCHESON, Chief Judge: Claiming an anticipatory breach of his policy, plaintiff below, appellant here, brought this suit to recover the present value of a health and accident policy together with penalties and attorneys' fees.

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The claim in substance was: that, on or about March 7, 1948, while the policy was still in force and effect, plaintiff received an injury which rendered him totally and continuously disabled within the meaning of the policy; that thereafter instead of paying him the amount then due under the policy terms, defendant repudiated its obligations to the plaintiff by returning to plaintiff the premium tendered it on July 8, 1949, and advising him that the policy of insurance was cancelled; that such action was an unconditional breach of the policy without cause or justification; and that, as a result thereof, he became entitled to declare the entire amount of benefits payable under the policy due and payable in a lump sum.

The defendant, admitting the issuance of the policy, denied that it is indebted to plaintiff and that it has repudiated its obligations under the policy as alleged. Further, expressly denying that it had on or about July 8, 1949, informed plaintiff that his policy had been cancelled, defendant alleged: that the policy was a renewable term policy, "renewable at the option of the company only", for an oriignal term ending July 11, 1948, renewal premium payable each one half year thereafter; and that, for the reasons[1] more fully set out in the answer, defendant, as it had a right to do, declined to renew the policy.

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1 These were the reasons:

On or about March 25, 1948, upon the request of plaintif, it furnished claim blanks asserting a claim for sickness benefits for the period from March 7th to March 24th, describing his condition as sciatica rheumatism, and defendant promptly issued and delivered to plaintiff its draft for $93.33, reciting that it was in full settlement of the benefits claimed,

Based upon the facts set forth, defendant pleaded; that plaintiff's disability is neither total or permanent; that the defendant, having presented and collected a claim for the period beginning May 28, 1948, for $600, is now estopped to assert another and different claim for benefits; and, finally there is no basis whatever in law or in fact for the claim that defendant had anticipatorily breached the policy.

Tried to the court and a jury, defendant, at the conclusion of the evidence, which showed the facts to be substantially as it had pleaded them, moved the court for a directed verdict. The motion was overruled, and the cause was submitted to the jury for its verdict upon whether the defendant was totally and permanently disabled, as claimed by him, as a result of the accident on March 7, 1948, and whether the defendant, without reason, cause, or justification, had repudiated its liability to plaintiff under the terms of the policy.

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and plaintiff endorsed and cashed such draft and retained, and still retains, the proceeds thereof.

On or about the 22nd of November, 1948, plaintiff made a second claim covering sick benefits from May 28, 1948 to June 14, 1948, describing his complaint as sciatica rheunmatism resulting from the incident of March 7, 1948.

In connection with the second claim, plaintiff advised defendant in writing that he had had no medical attention after July 2, 1948, and both he and his attending physician reported that he had resumed his duties on Nov. 15, 1948.

On or about the 13th day of June, 1949, defendant tendered plaintiff its draft in the sum of $600 in full settlement of this claim, and plaintiff endorsed and cashed the draft and has retained the proceeds.

On or about July 21, 1949, defendant notified plaintiff that before it would be willing to renew the health and accident features of his policy for another term, it would be necessary to attach a rider thereto, and defendant enclosed the form of the rider requesting that plaintiff sign one copy and return for the company's records and that the other be attached to the policy; that plaintiff failed to acknowledge the letter or to sign the rider.

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The jury having returned a verdict for the plaintiff, and the defendant having filed a motion for judgment non obstante veredicto, on the ground that the evidence raised no issue of fact and that a verdict should have been directed for the defendant, the district judge granted the motion and entered judgment against the plaintiff and in favor of the defendant.

Appealing from the judgment, plaintiff is here asserting that the evidence was sufficient to support the jury's finding that the defendant had wrongfully repudiated its liability under the policy, and insisting that a judgment on the verdict was demanded.

The defendant points to these undisputed facts: (1) that there was an entire absence of proof that it denied or repudiated, or in any way breached, anticipatorily or otherwise, any of the obligations of its policy; (2) that the policy was a renewable term policy "renewable at the option of the company", and that it had declined to renew it; (3) that no claim was made upon it, nor was proof of loss in respect of the claim of totally disabling accidental injury[2] made in the suit, but that, on the contrary, plaintiff had presented claims for sick benefits and those claims had been paid, and no other claim was ever filed with, or made to, defendant before the bringing of the suit.[3]

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2 Federal Union Ins. Co. v. Hardin, 115 SW (2) 1144.
3 Bank Saving Life v. Milan, 70 SW (2) 294.

So pointing, it invokes the settled law of Texas, that a policy providing, as this one does, that it is renewable only at the option of the insurer, is valid and enforceable, and that its declination to renew it was not, and could not be, a breach of the policy.[4] It declares, also, that it further is the settled law in Texas and generally elsewhere,[5] that even if plaintiff had made a demand, and defendant, as it did here, had in good faith rejected it, this would not constitute a renunciation or repudiation of the policy so as to be an anticipatory breach.[6]

Finally, it points to the fact that no demand was made by appellant, nor any proof of loss furnished by him, before bringing the suit, and, therefore, there was no basis whatever for the suit he brought.

We agree, The judgment was right. It is

AFFIRMED.

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Clerk of the United States Court
of Appeals for the Fifth Circuit

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4 Gulf Ins. Co. v. Riddle, 199 SW (2) 1000; Continental Fire & Cas. Corp. v. Swanson, 216 SW (2) 241.
5 Mobley v. N. Y. Life Ins. Co., 295 U. S. 632.
6 Sanders v. Aetna Life Ins. Co., 205 SW (2) 43; Universal Life & Acc. Ins. Co. v. Sanders, 102 SW (2) 405.

2. Judgment.

JUDGMENT

Extract from the Minutes of January 28, 1955.

No. 15160

HUBERT WESLEY DRIGGERS

VERSUS

BUSINESS MEN'S ASSURANCE COMANY OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, Business Men's Assurance Company of America, be condemned to pay the costs of this cause in this court for which execution may be issued out of the said District Court.

Hutcheson, Chief Judge, dissenting.

3. Order. Petition for Rehearing Denied

ORDER DENYING REHEARING.

Extract from the Minutes of February 24, 1955.

No. 15160

HUBERT WESLEY DRIGGERS

VERSUS

BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

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APPENDIX B

"Sec. 1652. State Laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."